

D R A F T

STATE WATER RESOURCES CONTROL BOARD RESOLUTION NO. 2021-

TO ADOPT A DROUGHT-RELATED EMERGENCY REGULATION FOR CURTAILMENT OF DIVERSIONS ON MILL AND DEER CREEKS DUE TO INSUFFICIENT FLOW FOR SPECIFIC FISHERIES

WHEREAS:

1. On May 10, 2021, Governor Gavin Newsom issued a Proclamation of a State of Emergency to exist in the Sacramento-San Joaquin Delta watershed, which include Mill Creek and Deer Creek, due to drought conditions (May 2021 Proclamation). The Proclamation directs various actions to strengthen the state's ability to manage water and habitat effectively in drought conditions. The May 2021 Proclamation finds the extreme drought conditions through much of the State presents urgent challenges, including the risk of water shortages in communities, greatly increased wildfire activity, diminished water for agriculture production, degraded habitat for many fish and wildlife species, threat of saltwater contamination of large fresh water supplies conveyed through the Sacramento-San Joaquin Delta, and additional water scarcity if drought conditions continue into 2022;
2. To ensure critical instream flows for species protection in the Sacramento-San Joaquin Delta Watersheds, the May 2021 Proclamation directs the State Water Resources Control Board (State Water Board) and California Department of Fish and Wildlife (CDFW) to evaluate the minimum instream flows and other actions needed to protect salmon, steelhead, and other native fishes in critical streams systems in the State and to work with water users and other parties on voluntary measures to implement those actions if possible. If voluntary measures do not occur, the proclamation directs the State Water Board to consider the development of emergency regulations to establish minimum drought instream flows. The May 2021 Proclamation also suspends the environmental review required by the California Environmental Quality Act to allow drought emergency regulations and other actions to take place as quickly as possible;
3. Due to extreme drought conditions, there is not enough water for all users or uses in most streams, and diversions under junior water rights will need to be curtailed to preserve flows for senior water right holders. In addition, some streams that provide habitat and migration corridors for federally or state listed endangered species will not maintain the minimum flows for these species to survive unless water diverters curtail use;

DRAFT

4. Central Valley spring-run Chinook salmon (*Oncorhynchus tshawytscha*) (CV SR Salmon) are listed as threatened under the state and federal Endangered Species Acts (Fish & G. Code, § 2050 et seq.; 16 U.S.C. § 1531 et seq.) and California Central Valley steelhead (*Oncorhynchus mykiss*) (CCV Steelhead) are listed as threatened under the federal Endangered Species Act. Because of the fragile nature of the fisheries in these watersheds, regulatory action to protect this public trust resource is warranted;
5. The National Marine Fisheries Service (NMFS), in consultation with CDFW and the United States Fish and Wildlife Service, has identified Deer Creek and Mill Creek, tributaries to the Sacramento River, along with Butte Creek, as priority watersheds for sustaining CV SR Salmon and CCV Steelhead. These streams contain migration, spawning, and rearing habitat for some of the last remaining naturally produced populations of threatened CV SR Salmon and CCV Steelhead;
6. Due to significant concerns over protection of CV SR Salmon and CCV Steelhead from reduced flows during the drought years of 2014 and 2015, NMFS and CDFW recommended and the State Water Board adopted emergency regulations requiring curtailment of diversions, with a small number of identified exceptions such as for minimum health and safety needs, to preserve minimum drought flows on Mill Creek and Deer Creek, as well as Antelope Creek, under California Code of Regulations, title 23, division 3, chapter 2, article 24, where those minimum flows were needed to protect fish and would not be available without emergency regulatory action by the Board. On Mill Creek, voluntary agreements authorized under the regulation as an alternative to curtailment provided for the drought emergency minimum instream flows for CV SR Salmon and CCV Steelhead in 2014 and 2015. For Deer Creek, a curtailment order was issued to water right holders in 2014 and 2015 to provide for the required minimum flows for CV SR Salmon and CCV Steelhead. Fish passage data collected by CDFW in 2014 and 2015 suggest that the drought emergency minimum instream flow requirements provided for successful fish passage on both Mill Creek and Deer Creek;
7. NMFS and CDFW have again recommended that the State Water Board adopt emergency flow protections for Mill Creek and Deer Creek consistent with the prior emergency regulations. Other regulatory requirements are in place that provide for flow needs on Antelope Creek. The Mill Creek and Deer Creek flows establish bare minimum flow levels needed for passage of migrating fish to and from spawning and rearing grounds in the watersheds above major diversions in the lower watersheds and do not represent flows that may be needed in the longer term to support these fish species and their habitat. CDFW and NMFS are currently developing such recommendations for consideration by the State Water Board in longer term planning processes;

DRAFT

8. The importance of Mill Creek and Deer Creek to the survival and recovery of salmon and steelhead in the Northern California's Central Valley is significant. Of the 19 independent CV SR Salmon populations that historically occurred, the populations in Mill Creek and Deer Creek are among the last of a small group of naturally produced populations. Mill Creek and Deer Creek are identified in NMFS's Final Central Valley Salmon and Steelhead Recovery Plan as Core 1 populations for CV SR Salmon and CCV Steelhead. Preserving and restoring Core 1 populations is the foundation of the recovery strategy because Core 1 populations are considered to have the greatest potential to support independent viable populations;
9. These two streams are unique in the Central Valley because they support naturally produced populations of CV SR Salmon and CCV Steelhead, yet have no upstream water storage facilities that can be managed to buffer the effects of drought on streamflow and water temperature requirements for these fish species. Instead, all of the water management facilities and water use occur on downstream reaches near the confluence with the Sacramento River, and their careful management is needed this year to ensure CV SR Salmon and CCV Steelhead are able to successfully migrate upstream to spawning habitat and downstream to the Sacramento River;
10. The State Water Board has a duty to protect, where feasible, the state's public trust resources, including fisheries, to the extent reasonable. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.);
11. The State Water Board also has the authority under article X, section 2 of the California Constitution and Water Code, section 100 to prevent the waste or unreasonable use, unreasonable method of use, or the unreasonable method of diversion of all waters of the State. Water Code, section 275 directs the State Water Board to "take all appropriate proceedings or actions before executive, legislative, or judicial agencies..." to enforce the constitutional and statutory prohibition against waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, commonly referred to as the reasonable use doctrine. The reasonable use doctrine applies to the diversion and use of both surface water and groundwater, and it applies irrespective of the type of water right held by the diverter or user. (*Peabody v. Vallejo* (1935) 2 Cal.2d 351.) What constitutes reasonable water use is dependent upon the entire circumstances presented and varies as the current situation changes. (*Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 194.);
12. The State Water Board has determined, based on the best available information, that certain minimum flows are necessary in the identified watersheds, below which levels serious harm and endangerment to the species may occur. The drought emergency minimum flow requirements due to insufficient flow for specific fisheries in the 2021 emergency regulation are consistent with recommendations from NMFS and CDFW and largely

DRAFT

consistent with those adopted in response to similar drought emergency conditions in 2014 and 2015. Specifically, the minimum flows identified in the 2021 emergency regulation remain unchanged from the 2015 minimum baseflow requirements for CV SR Salmon and CCV Steelhead, including the seasonal timing of required flows. The State Water Board recognizes that these drought emergency minimum flows do not represent optimal passage and ecosystem protection conditions for CV SR Salmon and CCV Steelhead and that such long-term flows should be developed and implemented as soon as practicable to balance the various needs in the watershed during all year types. The State Water Board encourages that such long-term efforts be developed through voluntary agreements where possible;

13. The State Water Board has identified the need for these drought emergency minimum flows during this drought period due to the lack of developed alternative water supplies to meet all needs during these emergency conditions. Application of the reasonable use doctrine under these circumstances requires specific consideration of the benefits of diverting water for current uses from the identified water bodies and the potential for harm to the protected species from such diversions under the current drought conditions. Having considered the available information, the State Water Board finds that, during the current drought conditions, diversions that would cause flows in these creeks to drop below these minimum passage levels are not reasonable, and that curtailment of such diversions is necessary to implement the requirements of California Constitution, Article X, section 2. This finding is narrowly targeted only to diversions of water needed under the current extraordinary drought conditions to afford minimum protection to migrating CV SR Salmon and CCV Steelhead, and should not be construed as a finding concerning the reasonableness of these diversions in general;
14. Given the essential nature of water in sustaining human life, and particularly in light of the declaration in Water Code section 106.3 of water supplies for consumption, sanitation and cooking as a human right, the statutory declaration of domestic use as the highest use in Water Code sections 106, and the statutory declaration in Water Code sections 350 et seq. that public water suppliers may declare a water shortage emergency to allow sufficient water for human consumption, sanitation, and fire protection, the State Water Board has determined that, under the circumstances being addressed by the regulation, diversion under even a more senior right for any other use when supplies required for minimum health and safety needs cannot be met is not reasonable under the California Constitution, Article X, §2.;
15. The regulation would provide that diversions from Mill Creek and Deer Creek are not reasonable to the extent those diversions would cause flows to drop below the specified minimums. Under the regulation, such diversions would be curtailed as appropriate to maintain those minimum flows, with the exception of diversions necessary for minimum health and safety needs. Diversions for minimum health and safety needs may not be curtailed,

DRAFT

notwithstanding a lower seniority than other, curtailed rights. The diversion or use of water in violation of this regulation would be not be a reasonable diversion or use and would constitute a violation of Water Code section 100;

16. Given the need to act quickly and with reasonable assurance that domestic and municipal supplies required for minimum health and safety needs are met, the data indicating that basic human needs require up to 55 gallons per person per day, and the overall small impact that small diversions tend to make on other uses, it has been determined that diversions for domestic and municipal health and safety use of less than 55 gallons per person, per day, may continue after issuance of a curtailment order without further approval from the Deputy Director of Water Rights (Deputy Director), subject to the conditions outlined in the regulation. All other diversions for minimum health and safety needs will be considered by the Deputy Director upon request of the diverter, or appropriate regulatory agency where a single diverter's operations could not alone alleviate the identified emergency;
17. The practice of flood irrigation for domestic lawn irrigation, as has been reported and observed in the Mill Creek and Deer Creek watersheds, is highly inefficient and results in excessive water diversions that do not put water resources to beneficial use to the full extent that they are capable. A range of alternatives to flood irrigation of domestic lawns, including sprinkler irrigation and lawn replacement, are widely available. To address inefficient irrigation practices for lawn watering that are unreasonable during times of water shortage, the emergency regulation limits domestic lawn watering to 18.5 gallons per day per 100 square feet, based on existing regulatory guidance at California Code of Regulations, title 23, section 697 for the amount of water considered reasonable for water right applications for certain domestic uses. Water conservation actions to reduce inefficient water use practices are especially important in drought years when water supply is low, as the May 2021 Proclamation has recognized. If dry conditions continue into 2022, it may be necessary to limit additional inefficient water use practices in the watershed. The State Water Board will continue to explore the need to develop requirements for additional water conservation actions to reduce inefficient water uses should the drought emergency continue;
18. On September 1, 2021, the State Water Board released the draft emergency regulation for a one week public comment period ending September 8, 2021. The September 1 notice also identified that the State Water Board would consider adoption of the regulation at the Board's regularly scheduled September 22, 2021 public Board Meeting;
19. The State Water Board proposes to adopt the emergency regulation in accordance with title 2, division 3, chapter 3.5 of the Government Code (commencing with section 11340). The State Water Board has the authority to adopt emergency regulations pursuant to Water Code section 1058.5, as it deems necessary to prevent the waste, unreasonable use, unreasonable

DRAFT

method of use, or unreasonable method of diversion of water, to promote water recycling or water conservation, and to require curtailment of diversions when water is not available under the diverter's priority of right;

20. Voluntary agreements between diverters, NMFS, and CDFW in Mill Creek were reached in the drought years of 2014 and 2015. State Water Board staff have reached out to water users on Mill Creek and Deer Creek to discuss possible voluntary agreements this year. So far, agreements have not been reached in either Mill Creek or Deer Creek this year, but agreements may still be possible. Agreements may be reached that have the potential to provide comparable protection to the fisheries as the flows in proposed section 876.5, and the proposed regulation would allow substitution of these agreements for curtailments if the agreements cover a significant percentage of the water diverted in the watersheds;
21. As discussed above, the State Water Board is adopting this emergency regulation because of the emergency drought conditions, the need for prompt action, and the unique attributes of these two tributaries. The vehicle of adopting an emergency regulation to identify a minimum flow requirement for fisheries protection and health and safety needs and limitation for domestic lawn irrigation is an appropriate approach in these limited circumstances; and
22. Pursuant to Water Code section 7, the State Water Board is authorized to delegate authority to the Executive Director and to the Deputy Director. The State Water Board has delegated authority to the Executive Director and to the Deputy Director.

THEREFORE BE IT RESOLVED THAT:

1. The State Water Board adopts sections 876.5, 876.7, and 878.4 and amends sections 878.1 and 879, in title 23, division 3, chapter 2, article 24 of the California Code of Regulations, as appended to this resolution, as an emergency regulation;
2. State Water Board staff shall submit the regulation to the Office of Administrative Law (OAL) for final approval;
3. This regulation shall remain in effect for one year after filing with the Secretary of State unless: (i) the State Water Board determines that it is no longer necessary due to changed conditions, (ii) the conditions specified in Water Code section 1058.5 subdivision (a)(2) are no longer in effect, in which case this regulation is deemed repealed, or (iii) the State Water Board renews the regulation due to continued drought conditions as described in Water Code section 1058.5;
4. If, during the approval process, State Water Board staff, the State Water Board, or OAL determines that minor corrections to the language of the regulation or supporting documentation are needed for clarity or consistency, the State Water Board Executive Director or designee may make such changes; and

D R A F T

5. The State Water Board delegates to the Deputy Director the authority to act on requests for approvals pursuant to the regulation.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 22, 2021.

Jeanine Townsend
Clerk to the Board